STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

-v-

Supreme Court No. 154128
Court of Appeals No. 311625
Lower Court No. 99-005393-01

JUSTLY ERNEST JOHNSON,
Defendant-Appellant.

DEFENDANT-APPELLANT'S REPLY BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL AFTER REMAND

(Filed Concurrently with the Reply in Companion Case, *People v Kendrick Scott*, Court of Appeals No. 317915)

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INTRODUCTION

The prosecution's answer never responds to the central point of Mr. Johnson's *Cress* claim: The trial court and Court of Appeals used the wrong standard by looking for any reason to uphold the conviction, instead of deciding whether there is a reasonable probability of a different outcome based on the totality of the evidence.

Moreover, the prosecution's response to the claim pertaining to felony murder is tellingly weak. It concedes that the State's theory at trial was felony murder, resulting from a robbery. Pros. Brief at 40.[1] It also concedes that the trial court, after the evidentiary hearing, deemed the robbery/ larceny theory to be defeated. *Id.* As such, it was a *per se* abuse of discretion to deny a new trial: In doing so, the trial court admitted that the prosecution could not prove felony murder upon retrial, but nevertheless held that there would be no reasonable probability of a different outcome upon retrial. Such an illogical ruling, defying the standard for a new trial based on new evidence, was an abuse of discretion and warrants reversal. *People v Grissom*, 492 Mich 296, 321; 821 NW2d 50 (2012) ("This ruling was legally incorrect. Accordingly, [it] was necessarily an abuse of discretion.").

This case remains a stark demonstration of the injustice that results when courts refuse to properly engage with the new evidence rules that our judicial system has created specifically to rectify miscarriages of justice such as the one suffered by Mr. Johnson and his codefendant, Mr. Scott. This Court should either summarily reverse the decisions below or grant leave to appeal to address the significant questions presented in the Application for Leave to Appeal.

[1] The prosecution states that the underlying felony at trial was larceny (not robbery), but the distinction is immaterial here. The prosecution concedes that the trial court below, after the evidentiary hearing, deemed this was not a felony murder arising from a robbery (or larceny) gone bad—which was indisputably the State's theory at trial. Pros. Brief at 40.

ARGUMENT

I. The Prosecution's Response Does Not Address The Substance Of Mr. Johnson's *Cress* Argument, And The Fact Remains That The Determinations Of Fact That The Trial Court Made In This Instance Were Clearly Erroneous And Belied By The Record Of The Case.

The prosecution's brief stresses the importance of credibility determinations made by trial courts, citing to this Court's decision in *People v Tyner*, 497 Mich 1001; 861 NW2d 622 (2015). Pros. Brief at 33. Of course, no lawyer would disagree with the basic premise that trial court findings of fact merit deference. But the United States Supreme Court has made clear that "deference does not imply abandonment or abdication of judicial review." *Miller-El v Cockrell*, 537 US 322, 340; 123 S Ct 1029; 154 L Ed 2d 931 (2003). Even with all appropriate deference, there can be no question that the trial court's findings relevant to the *Cress* claim were contrary to the record and thus clearly erroneous.

The prosecution's brief makes no attempt to address the specific points made by Mr. Johnson in support of his *Cress* argument. In this Reply, Mr. Johnson will not rehash wholesale the arguments made in his Application, but he instead encourages the Court to closely consider the specific points of clear error discussed in Arguments I(A) through I(D) in his Application.

The prosecution's response does not address the systematic error Mr. Johnson raised in his Application. The courts below cherry-picked points from the record, often misconstruing them, while failing to address the broader question of whether the new evidence, in context of the full record of the case, makes a different outcome reasonably probable upon retrial. But that latter inquiry is, of course, the relevant one, *Tyner*, 497 Mich at 1001, and the record here make it clear that it should be resolved in Mr. Johnson's favor.

This is a case where a new eyewitness, CJ Skinner—the victim's own son, who was an undisputed eyewitness to the murder—has now testified under oath that he is absolutely sure that

the perpetrator was neither Mr. Johnson nor Mr. Scott. No eyewitness was ever before presented in this case: The prosecution's case consisted only of unreliable hearsay accounts from two young men who were themselves in custody and threatened with prosecution for the murder. The accounts these men gave have not only been recanted, but have actually been shown to be verifiably false (another point that the courts below and the prosecution's brief fail to address). *See* Leave Application at Argument I(A).

To hold that despite this new evidence, there is not a reasonable probability of a different outcome would mean that it is essentially impossible to satisfy the *Cress* materiality prong. That certainly cannot be what this Court intended in creating a materiality prong that has traditionally only required that "it is reasonable to assume [the new evidence] **might effect a different result** on a retrial of the cause." *People v Clark*, 363 Mich 643, 647; 110 NW2d 638 (1961) (emphasis added). Any perceived shortcomings in Skinner's account must evaluated by a jury at a new trial, in light of all the other evidence in this case—as opposed to being guessed about at this stage. *See People v Lewis*, 64 Mich App 175, 185; 235 NW2d 100 (1975) (at post-conviction hearing, "[t]he trial judge may not make any judgment as to whether he thinks the witnesses are in fact telling the truth, for that is a function of the jury upon retrial.").

II. There Is No Reasonable Way To Defend The Trial Court's Holding Sustaining The Felony Murder Conviction Despite Admitting That The Only Evidence That Supported That Conviction Is Plainly Not Credible.

Can a trial court decision that concludes one thing, while repudiating the only evidence that supports that conclusion, ever be deemed reasonable? The answer has to be no, and the case law supports that conclusion. *People v McSwain*, 259 Mich App 654, 681; 676 NW2d 236 (2003) (A trial court clearly errs when its "findings do not accurately portray the factual background of the case"); *People v Thenghkam*, 240 Mich App 29, 42; 610 NW2d 571 (2000)

("[a] factual finding without support in the record constitutes clear error.") (*abrogated on other grounds by People v Petty*, 469 Mich 108; 665 NW2d 443 (2003)).

In this case, the prosecution concedes that the State's theory at trial was felony murder—that is, the killing resulted from a robbery. Pros. Brief at 40. It also concedes that the trial court, after the evidentiary hearing, deemed the robbery/larceny theory to be defeated. *Id.* Indeed, there can be no way to misread the trial court's view on the evidence of the case: "So, could the killing of Lisa Kindred have been a robbery gone bad or a kidnapping gone bad? Not in my opinion." EH 8/7/15 at 16. But if the killing could not have been the result of a robbery gone bad, **this conviction simply cannot be sustained**. The prosecutor at trial only presented a felony murder theory to the jury, and indeed argued against any intent to kill: **"I don't suggest to you that either [defendant] actually intended to kill Lisa Kindred. I don't suggest that at all."** Kendrick Scott Tr. 6/1/00 at 36 (emphasis added). The prosecutor thus affirmatively eschewed any theory of premeditated murder and relied only on felony murder involving a robbery. *See also* KS Tr. 5/31/00 at 13 ("[T]his is a felony murder case. This is a case about a robbery or attempted robbery.").

Therefore, the trial court's conclusion that there is no reasonable probability of a different outcome upon retrial, despite its finding that the robbery theory is not credible, is a legally incorrect ruling, because a conviction for felony murder is impossible if the underlying felony cannot be proved. *People v Saxton*, 118 Mich App 681, 689-92; 325 NW2d 795 (1982). **Such a legally incorrect ruling is *per se* abuse of discretion**. *Grissom*, 492 Mich at 321. This claim is more fully discussed in Argument II(B) of Mr. Johnson's Application.

Despite conceding that the prosecution's theory at trial was felony murder based on a robbery/larceny, and that the trial court deemed that theory to be defeated after the evidentiary hearing, the prosecution argues that relief should be denied because the trial court relied on the

domestic violence records to make its finding, and those records are outside the scope of the remand. Pros. Brief at 40-41. However: (1) the trial court's finding was not based solely on the domestic violence records; and (2) those records are within the scope of the remand.

A. The Trial Court's Finding Was Not Based Solely On The Domestic Violence Records: It Also Relied On Skinner's Account And The Highly Improbable Nature Of Will Kindred's Own Trial Testimony.

Contrary to the prosecution's claim, Pros. Brief at 40, the trial court's finding that the robbery-gone-bad theory was defeated in light of the evidence at the 2015 hearing was not based on just the domestic violence records. Judge Callahan also relied on the evidentiary hearing testimony of CJ Skinner, and the lack of credibility of Will Kindred's trial testimony in light of the new evidence—both of which were indisputably proper for the judge to rely on.

Judge Callahan made clear that he credited the parts of the testimony of CJ Skinner that implicated Will Kindred in his wife's murder by portraying him to be a violent man who was very hostile toward his family. *See* Trial Court Findings, 8/7/15 at 14-15 (noting "the testimony of Mr. Skinner concerning how violent this man was with him."). Judge Callahan also evaluated the credibility of Mr. Kindred's own trial testimony in light of all of the new and old evidence in this case. *Id.* at 15-16. This is precisely the sort of analysis a trial court is required to conduct when considering a motion for relief from judgment. *See Grissom*, 492 Mich at 311; *Id.* at 332-35 (Kelly, J, concurring). In making this evaluation, Judge Callahan determined that Mr. Kindred's trial testimony lacked credibility, which is a reasonable finding, and one that the judge elaborated upon in detail. Tr. 8/7/15 at 15-16.

Judge Callahan's factual findings pertaining to the credibility of Mr. Kindred's account in light of the new evidence, and to the viability of the robbery-gone-bad theory in light of all of the new evidence, were reasonable. And they were well within the discretion of a trial court considering a motion for relief from judgment, as *Grissom* makes clear.

B. In Any Case, The Domestic Violence Records Do Fall Within The Scope Of This Court's Remand Order In This Case.

This Court's Remand Order in this case, as a whole, only makes sense if it is read to include the domestic violence records. Although the prosecution mentions only three issues, Pros. Brief at 41, the Remand Order actually consisted of *four issues*. In Mr. Johnson's case, this Court included this fourth point:

> (4) if the court determines that the defendant is not entitled to relief, but that the defendant in *People v Kendrick Scott* (Docket No. 148324) is entitled to relief, the Court of Appeals shall determine whether the defendant would have been entitled to relief but for MCR 6.508(D)(2), and, if so, whether, in the court's judgment, the denial of such relief in that circumstance violates the defendant's constitutional right to due process under either the federal or state constitutions.

November 21, 2014, Remand Order. The meaning of the fourth remand issue is clear: There are certain issues to be considered on remand that were never previously presented by Mr. Scott, but *were* previously presented by Mr. Johnson (therefore implicating MCR 6.508(D)(2)). The *only* such issues are the recantations of the State's only two inculpatory witnesses and the newly discovered domestic violence records. Those two issues must fall within the scope of the remand or the fourth part of the order would be superfluous. Additionally, as argued in the Application for Leave to Appeal, this Court may expand the scope of the remand, even if it determines that the domestic violence records are not in the original scope. *See* Application at II(D).

The prosecution also claims that the trial court should not have considered the domestic violence records in Mr. Johnson's case because he did not raise a specific claim pertaining to them in the instant motion for relief from judgment. Pros. Brief at 41-42. However, given the fourth point of this Court's remand, the issue certainly must be considered. Even though the domestic violence records were not raised as a specific *legal* claim for Mr. Johnson, the *factual* significance of those records must factor into the materiality evaluation of the new evidence claims made by Mr. Johnson. The *Cress* standard requires a holistic evaluation of the materiality

of *all* of the evidence (new and old), in light of the new evidence. *Grissom*, 492 Mich at 311; *id.* at 332-35 (Kelly, J., concurring); *People v Cress*, 468 Mich 678; 692; 664 NW2d 174 (2003) (evaluating materiality collectively). This point is fully addressed in Argument I(C) of the Application for Leave to Appeal.

C. The Domestic Violence Reports Are Material And Relevant, Given The Suspicious Behavior Of The Victim's Husband, And They Would Be Admissible Upon Retrial.

Contrary to the prosecution's claims, Pros. Brief at 43, the history of domestic violence is highly material and relevant, and it would be admissible upon retrial.

Will Kindred's behavior on the night of the murder was inexplicable. Kindred drove his wife and three young children, including a newborn, to a dark and unsafe neighborhood after midnight, and left them in the car for 30 to 45 minutes, allegedly to talk to a relative about purchasing a motorcycle. It is entirely unsurprising that Judge Callahan found these facts very suspicious when evaluating the evidence upon remand. Tr. 8/7/15 at 14-16.

At trial, however, there was no basis by which the defendants could seek to undermine Mr. Kindred, and he testified as a blameless, grieving husband. Evidence that has emerged since trial changes the narrative entirely. With the discovery of the domestic violence reports, Kindred is revealed to be a man with a history of abusing and threatening the victim, and with real motive and opportunity to set her up to be killed. As the United States Supreme Court said, "[w]hen identity [of the suspect] is in question, motive is key. *House v Bell,* 547 US 518, 540; 126 S Ct 2064; 165 L Ed 2d 1 (2006). Had the jury known this history of violence that Lisa Kindred had suffered at the hands of Will Kindred, it would have regarded Will's testimony with much greater suspicion, and the overall balance of the case would have been very different.

And this history of domestic abuse would be admissible at trial for any one of several reasons. First, when a domestic violence victim is killed, the prior domestic violence records are

admissible motive evidence. *E.g. People v Ortiz*, 249 Mich App 297; 627 NW2d 417 (2001). Indeed, in homicide cases, proof of a prior assault of the victim is "highly probative" of motive and intent. *People v Hill*, 167 Mich App 756, 762-63; 423 NW3d 346 (1988); *People v Rice*, 235 Mich App 429, 440; 597 NW2d 843 (1999).

Next, the history of domestic violence is material impeachment evidence, and would be admissible because it relates to the motives, biases and credibility of Will Kindred, a testifying fact witness. *Davis v Alaska*, 415 US 308, 316-17; 94 S Ct 1105; 39 L Ed 2d 347 (1974).

Finally, a defendant always has a due process right to introduce relevant evidence of third party guilt. *See Holmes v South Carolina,* 547 US 319; 126 S Ct 1727; 164 L Ed 2d 503 (2006). In this case, unlike the cases cited by the prosecution, the third party is not some peripheral person: it is the victim's abusive husband **who personally placed her in the vulnerable position leading to her death**. Such evidence of third party guilt would be admissible and helps create reasonable doubt as to Mr. Johnson's guilt.

D. The Trial Court's Finding That The New Evidence Defeats The Robbery-Gone-Bad Theory Is Precisely The Sort Of Finding Courts Are Supposed To Make When Deciding Motions For Relief From Judgment—Not Some Irrelevant Aside.

The prosecution seeks to frame Judge Callahan's findings about the validity of the felony murder theory as an irrelevant aside that the trial court was not entitled to address. Pros. Brief at 44-45. However, the very purpose of a court's evaluation in deciding a motion for relief from judgment is to determine whether, in light of the evidence now presented, there would be a reasonable probability of a different outcome upon retrial. *Grissom*, 492 Mich at 313. That is precisely the analysis Judge Callahan engaged in when he addressed the validity of the felony murder theory in light of the account of CJ Skinner, the domestic violence records, and a review of Will Kindred's trial testimony. Upon reviewing the new and old evidence collectively, the trial court found that the felony murder theory could not be sustained upon retrial. When Judge

Callahan said: **"So, could the killing of Lisa Kindred have been a robbery gone bad or a kidnapping gone bad? Not in my opinion."** Tr. 8/7/15 at 16 (emphasis added), he made a crucial and relevant finding of fact that deserves deference from this Court.

However, because Judge Callahan's application of that finding was patently unreasonable (sustaining the felony murder convictions even after concluding the felony murder theory was defeated by the evidence now in the record), this Court should reverse his decision to deny the motion for relief from judgment and order a new trial.

III. Mr. Johnson's Actual Innocence Claim Is Properly Before This Court And Is A Viable Ground For Relief In This Exceptional, Overwhelming Case Of Actual Innocence.

The prosecution argues that this Court cannot consider Mr. Johnson's actual innocence claim because it was not presented to the courts below, Pros. Brief at 47, but that is incorrect. Actual innocence was an implicit part of the inquiry on remand, given the language of the fourth part of the Remand Order quoted above. While it is true that the federal claim based specifically on *Herrera v Collins*, 506 US 390; 113 S Ct 853; 122 L Ed 2d 203 (1993), was not presented below, it is a basis of relief that this Court has not yet recognized, as the supreme courts of several other states have done. *See* Application at IV(C). Thus, it really is an issue for this Court, and not the lower courts. This Court can and should use its power under MCR 7.316(3) to "permit the reasons or grounds of appeal to be amended or new grounds to be added," if it concludes that it cannot otherwise reach certain parts of Argument IV of the Leave Application.

CONCLUSION

For the reasons stated above, and more fully explained in his application for leave to appeal, Mr. Johnson respectfully asks that this Court either 1) summarily reverse the decisions below and order relief from judgment and a new trial, or 2) grant his application for leave to appeal.

Respectfully Submitted,

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